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No. 00-191

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICI CURIAE SENATOR JOHN F. REED, CONGRESSMAN SHERWOOD BOEHLERT, CONGRESSMAN F. ALLEN BOYD, JR., SENATOR MAX CLELAND, CONGRESSMAN LLOYD DOGGETT, CONGRESSMAN SAM FARR, SENATOR RUSSELL D. FEINGOLD, CONGRESSMAN MAURICE D. HINCHEY, SENATOR CARL LEVIN, CONGRESSMAN SANDER LEVIN, SENATOR JOHN McCAIN, CONGRESSWOMAN CAROLYN B. MALONEY, CONGRESSMAN JAMES H. MALONEY, CONGRESSMAN MARTIN T. MEEHAN, CONGRESSMAN GEORGE MILLER, CONGRESSMAN DENNIS MOORE, CONGRESSWOMAN JANICE D. SCHAKOWSKY, SENATOR CHARLES E. SCHUMER, CONGRESSMAN CHRISTOPHER SHAYS, CONGRESSMAN JOHN M. SPRATT, JR., CONGRESSMAN JOHN F. TIERNEY, AND CONGRESSMAN ANTHONY D. WEINER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici include the following Members of the United States Senate and the United States House of Representatives: Senator John F. Reed, Congressman Sherwood Boehlert, Congressman F. Allen Boyd, Jr., Senator Max Cleland, Congressman Lloyd Doggett, Congressman Sam Farr, Senator Russell D. Feingold, Congressman Maurice D. Hinchey, Senator Carl Levin, Congressman Sander Levin, Senator John McCain, Congresswoman Carolyn B. Maloney, Congressman James H. Maloney, Congressman Martin T. Meehan, Congressman George Miller, Congressman Dennis Moore, Congresswoman Janice D. Schakowsky, Senator Charles E. Schumer, Congressman Christopher Shays, Congressman John M. Spratt, Jr., Congressman John F. Tierney, and Congressman Anthony D. Weiner.

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, is one of several campaign finance laws passed by Congress. *Amici*, a bipartisan group of present Senators and Representatives, believe that the FECA provisions, including the limit struck down by the Tenth Circuit on coordinated spending by political parties are essential, even if not independently sufficient, to maintain the public's confidence in the integrity of our political system.

Moreover, as *amici* told the Court in *Shrink Missouri*, the personal experiences of *amici* since this Court's decision in *Buckley* demonstrate the need for clearer and more comprehensive authority to stem the evasion of existing limits and to vindicate the central premise in *Buckley*—that the government has a compelling interest in ensuring faith in the

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation or submission of this brief.

integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both elected representatives and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley* properly accorded legislatures such deference with regard to contribution limits. The Court should reaffirm that deference with respect to the coordinated expenditure limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public's faith and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy.

SUMMARY OF ARGUMENT

This case, like *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), presents a fundamental challenge to the authority of Congress to defend and protect the integrity of the political process. In the decision under review, a divided Tenth Circuit panel has invalidated 2 U.S.C. § 441a(d)(3) of the FECA insofar as it limits the coordinated expenditures political parties may make on behalf of candidates for federal office. Such restrictions are, as Congress and this Court have recognized for more than two decades, indispensable to any regulatory program aimed at eliminating the risks of unlimited campaign contributions because coordinated expenditures on behalf of a candidate are no different than direct financial contributions to that candidate. *See Buckley v. Valeo*, 424 U.S. 1, 46-47 & n.53 (1976). In the experience of *amici*, the party often simply acts as a conduit for cash between donors and candidates. These coordinated expenditures can, and should, be regulated. As this Court held in *Buckley v. Valeo*, with respect to similar limits, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (*quoting United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

Nothing in the more than two decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. To the contrary, the accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public's faith in the legitimacy of government and in the elections that choose whom shall

govern. The issue presented in this case is simply not about censorship. Here "constitutionally protected interests lie on both sides of the legal question." *Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring). There must be leeway for the government to address the core societal interest, recognized by this Court, *see Buckley*, 424 U.S. at 26-27, in ensuring the integrity—in every sense of the word—of our representative system of government. In *Shrink Missouri*, this Court took an important first step in reaffirming the competing constitutional interests at stake. The instant case provides an appropriate opportunity for the Court to make clear that the First Amendment does not hamstring legislators' attempts to protect the viability of our very structure of government. "[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The needed leeway can be provided, consistent with the First Amendment, in two ways. First, intermediate scrutiny should apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Ordinarily, campaign finance laws are designed to regulate the underlying activities that generate the speech at issue, not the speech itself. Accordingly, these laws should be reviewed under intermediate scrutiny. *See Turner I*, 512 U.S. at 642-43.

Second, legislatures should be given substantial deference to design and enact campaign finance laws. *Buckley* provided such deference with regard to contribution limits, and the

practical experience of *amici* since *Buckley* with respect to the financing of campaigns has demonstrated that deference is warranted for all such laws. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what campaign finance laws are needed to sustain faith in the electoral process. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

Application of these principles should result in reversal of the Tenth Circuit's judgment in this case.

ARGUMENT

I. Intermediate Scrutiny Should Apply to Campaign Finance Laws Not Aimed at the Communicative Impact of Speech.

The Court should not leave the elected branches of government in a straitjacket, preventing enactment and enforcement of campaign finance laws needed to restore and maintain Americans' faith in "the integrity of [the] electoral process," an attribute "basic to a democratic society." *United States v. International Union, United Auto. Workers*, 352 U.S. 567, 570 (1957). Rather, practical experience since *Buckley*, as well as the Court's own precedent, support application of a lenient standard of review and the provision of substantial deference to legislative judgment. Specifically, as

demonstrated below, this Court should make clear that intermediate scrutiny applies to contribution limits, including coordinated expenditure limits, and to all campaign reforms that are not aimed at the communicative impact of speech, and it should recognize the institutional competence uniquely possessed by legislatures both to identify threats to the electoral system and to implement corresponding reforms.

The Tenth Circuit reviewed the coordinated expenditure limit—which is effectively a contribution limit—under the standard of review articulated in *Buckley* for contribution limits. *FEC v. Colorado Republican Fed. Election Comm.*, 213 F.3d 1221, 1226 (10th Cir. 2000) ("*Colorado Republican II*"). Although the limit can withstand, and should be upheld, under *Buckley*'s articulation, subsequent cases have further developed the law regarding the appropriate level of review. This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of review for laws challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not [on] others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for doing so is unrelated to the

content of the expression limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[2]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, campaign finance laws should be subjected to intermediate scrutiny if they are justified on grounds unrelated to the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3]

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[2] The mere fact that campaign finance laws only address laws related to campaign financing does not mean such laws are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (internal quotation marks omitted).

[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 120 S. Ct. at 903 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government's justification that is

Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law relates to the communicative impact of the speech.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. Recent reform efforts in a number of states indicate continued dissatisfaction with the current system of campaign financing.[4] As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the

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controlling. *Ward*, 491 U.S. at 791.

[4] *See* <http://www.publicampaign.org/statemap.html> (visited Nov.17, 2000) (indicating that, as of February 1999, public financing bills had been or probably would be introduced in 16 state legislatures, coalitions in 18 other states were pursuing reform, and four states—Maine, Vermont, Arizona, and Massachusetts—already have passed such reform by initiative or legislative action); *State Capitols Report* (Sept. 26, 1997) (listing status of reform proposals in all 50 states).

government in general, is exacerbated by public perception that elected officials are more responsive to those who contribute to their campaigns than to those who do not. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Automobile Workers*, 352 U.S. at 575.

These justifications for reform address a public concern wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). The principal purpose of FECA's contribution limits, including the coordinated expenditure limits, was to preserve the integrity of the nation's electoral process. That is the basis upon which the government defends the limits at issue here. Pet. at 15-25. This objective of preserving the integrity of the electoral process is wholly unrelated to the communicative impact of the regulated contributions. Intermediate scrutiny is accordingly the appropriate level of review.

II. Substantial Deference Should Be Given to Legislatures to Address the Significant Public Interests Implicated by Campaign Financing.

As we argued in *Shrink Missouri*, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance laws. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 547-48.

This deference has been applied to campaign finance laws even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For

example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in original). There, the Court affirmed a campaign reform, even in the face of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is provided in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to assess. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the

avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem was not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained.*" *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest).

Just last Term, the Court accorded similar deference to the legislature in *Shrink Missouri*. Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 120 S. Ct. at 906-07. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding

"there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 908.[5]

This deference is appropriate, and should be afforded here. The Tenth Circuit paid insufficient heed to Congress's greater expertise in the campaign finance arena, substituting its paean to political parties for the practical experience of the Congress.[6] The coordinated expenditure limit on political parties reflects the Congressional judgment that, while political parties should be able to engage in larger coordinated expenditures than individuals and other groups, their coordinated expenditures should not be unlimited. *See* 2 U.S.C. § 441a(d)(3).

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[5] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 907-08.

[6] The Tenth Circuit's view of political parties is starkly at odds with that of the Founding Fathers, who:

> "feared and despised political parties. The 'root idea' of Anglo-American political thought concerning parties, Richard Hofstadter writes of the founding period, was that 'parties are evil.' Thomas Jefferson denounced party affiliation as 'the last degradation of a free and moral agent.' Alexander Hamilton claimed that the goal of the Constitution was 'to abolish factions, and to unite all parties for the general welfare.' George Washington warned in his Farewell Address against 'the baneful effects of the spirit of party.' Even James Madison, one of the least dogmatic of the founders, thought that political parties were, at best, unavoidable evils in a free society–forces to be condemned, yet patiently endured."

James A. Gardner, *Can Party Politics Be Virtuous?*, 100 Colum. L. Rev. 667, 667-68 (April 2000) (internal citations and footnotes omitted).

In so doing, Congress found that coordinated expenditures are tantamount to direct contributions to a candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Indeed, as noted in *Colorado Republican I*, "many such expenditures are . . . virtually indistinguishable from simple contributions (compare for example, a donation of money with direct payment of a candidate's media bills)." *Colorado Republican Fed. Election Comm. v. FEC*, 518 U.S. 604, 624 (1996) (plurality opinion).[7] In the practical experience of *amici*, contrary to the Tenth Circuit's apparent assumption, a party's coordinated expenditures are often conduits for cash to the candidate, not conduits for information about the party's position on various issues.[8] Any speech that results is really that of the candidate, not that of the party.[9]

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[7] Treating coordinated expenditures as "contributions" is thus consistent with the distinction the Court made in *Buckley* between contributions and expenditures. *See California Med. Ass'n*, 453 U.S. at 195 (plurality) ("The type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual, or group in order to engage directly in political speech."). It is undisputed that "[p]arty committees work closely with candidates and campaigns in making coordinated expenditures." *FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200 (D. Colo. 1999) ("*Colorado Republican II*").

[8] This phenomena is demonstrated by the 2000 campaign, in which party-coordinated advertisements for some candidates touted the candidate's *independence* from the party, including the candidate's positions on issues that were contrary to positions of the party. *See* Katherine Gregg, *GOP Ad Touts R.I.'s "Wayward" Son – Democrats Scoff at Republican Pride in Lincoln Chafee's Votes*, The Providence Journal, Aug. 25, 2000 at A01; Paul Kane, *DSCC Hits Ashcroft For Bill "Torch" Wrote Claritin Patent Becomes Issue in Senate Race*, Roll Call, Sept. 21, 2000.

[9] Limiting coordinated expenditures still leaves ample avenues of communication open for speech by political parties, including the unlimited independent expenditures afforded them by this Court's holding in *Colorado Republican I*.

Therefore, just like the contribution limits at issue in *Buckley* and *Shrink Missouri*, it is neither "novel nor implausible" that large coordinated expenditures by political parties create the appearance of corruption and undermine citizens' faith in the electoral process. As the FEC demonstrated below, *see Colorado Republican II*, 213 F.3d at 1240-44 (Seymour, C.J., dissenting), unlimited coordinated party expenditures create at least the perception that those who donate large sums to political parties for such coordinated expenditures, as well as those within the parties who control the donations to candidates made through coordinated expenditures, may enjoy positions of "improper influence." *Shrink Missouri*, 120 S. Ct. at 905; *see also Colorado Republican I*, 518 U.S. at 648 (Stevens, J., dissenting).[10] Moreover, the ability to donate $20,000 to political parties, *see* 2 U.S.C. § 441a(a)(1)(B), presents the danger that donors would use unlimited coordinated expenditures by parties to evade the contributions limits upheld by *Buckley*. *See California Med. Ass'n*, 453 U.S. at 197-99 (plurality) (upholding contribution limits to multicandidate political

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[10] These concerns about political parties are not new. As explained by Senator Robinson in 1924: "'We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.'" *See United Automobile Workers*, 352 U.S. at 576-77 (quoting 65 Cong. Rec. 9507-08 (1924)).

committees to prevent evasion of other limits); *Buckley*, 424 U.S. at 38 (upholding total contribution limits on individuals for same reason); *see also* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 620 (April 2000) ("In the last decade, party campaign finance practices have blown large, and widening, holes in the campaign finance system that Congress created with the [FECA], and that the Supreme Court modified and sustained in *Buckley v. Valeo*."); 100 Colum. L. Rev. at 665.

There is no danger that the limit here "insulates legislators from effective electoral challenge." *Shrink Missouri*, 120 S. Ct. at 913 (Breyer, J., concurring). The limit allows ample coordinated spending on behalf of challengers.[11] Moreover, as most incumbents and challengers belong to one of the two major parties, the limit on coordinated party expenditures affects incumbents and challengers equally. Indeed, the limit helps to level the playing field for independent challengers who do not belong to a political party, by helping prevent them from being overwhelmed by unlimited coordinated party spending. Such evenhanded restrictions are entitled to deference unless there is evidence of "invidious discrimination against challengers as a class." *Buckley*, 424 U.S. at 31. In fact, as the Court acknowledged in *Buckley*, certain campaign finance laws, including contribution limits, generally will negatively affect incumbents more than challengers. *Id.* at 32.

Accordingly, the Congressional judgment reflected in the limit on coordinated spending by political parties—and in all campaign finance laws—is entitled to deference. Legislatures, not courts, are institutionally better suited to assess the need for

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[11] The coordinated expenditure limit for Colorado candidates for the United States Senate in the 1996 election was almost $171,000. *Colorado Republican II*, 41 F. Supp. 2d at 1201 n.6.

campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." 518 U.S. at 650 (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 120 S. Ct. at 912 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. *See generally* Schultz, *supra*, 18 Rev. Litig. at 113-19.[12] *Amici*'s assessment is supported by empirical evidence. The public's loss of faith in the system is most apparent in citizens' failure to participate in the democratic process. The 1996 presidential election, with its explosion in "soft money" attack advertising, attracted only 49

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[12] *See also, e.g.*, Anthony Corrado, *Party Soft Money: Introduction*, in *Campaign Finance Reform: A Sourcebook* 171-73 (A. Corrado *et al.* eds., 1997) (describing rise of soft money as a means of circumventing FECA contribution limits); Rosenkranz, *supra*, at 94; *Soft Money: A Look at the Loopholes* <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm> (visited Nov. 17, 2000) ("Essentially, soft money blew a hole through the reforms of the 1970s. By any reasonable interpretation, the [1996] campaigns no longer adhered to contribution or spending limits.").

percent of registered voters, the lowest total in 70 years. Rosenkranz, *supra*, at 17. Although participation rose to approximately 51 percent in this year's election,[13] that number is still one of the lowest in the democratic world.[14] Our woeful level of electoral participation can be traced in large part to the perceived influence of large campaign contributors over elected officials. In 1964, 29 percent of Americans believed that the government was "'pretty much run by a few big interests looking out for themselves'" and not "'for the benefit of all people.'"[15] By 1992, that number had ballooned to 76 percent.[16] Numerous opinion surveys confirm that Americans believe elected officials serve wealthy donors and not ordinary citizens. For example, a March 2000 Mellman Group poll found that 87 percent of voters believed that contributions by special interest groups affect the voting behavior of Members of Congress.[17] More bluntly, 71 percent of respondents in a 1994 Gallup Poll agreed with the statement: "Our present system of government is democratic in name only. In fact special interests run things."[18]

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[13] Eric Lipton, *Problems Stir Calls to End "19th Century" Voting Process*, New York Times, Nov. 13, 2000, at A21.

[14] <http://www.fec.gov/pages/Internat.htm> (visited Nov. 21, 2000)

[15] Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 3 & n.4 (1996) (citing University of Michigan Center for Political Studies, American National Election Studies 1952-1990).

[16] *Id.* at 3 & n.3.

[17] <http://www.publiccampaign.org/articles/4-3report/report4_3_00.html (visited Nov. 17, 2000).

[18] <http://www.commoncause.org/states/connecticut/polls.htm> (visited Nov. 17, 2000). Numerous polls have produced variations on the same theme. A 1997 *New York Times*-CBS poll found that 75 percent of the public believes "many public officials make or change policy decisions as a result of money they receive from major contributors." Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, New York Times, Apr. 8, 1997, at A1. In a 1994 Bannon Research study of registered voters in five states, 83 percent expressed the view that "politicians pay more attention to monied special interests than people." <http://www.commoncause.org/states/connecticut/polls.htm> (visited Nov. 17, 2000). Similarly, a 1997 CNN-*USA Today*-Gallup poll found that 53 percent of the public believed campaign contributions influenced policy choices "a great deal," while only 11 percent believed the effect was "not much" or "not at all." <http://www.publicampaign.org/pollsumm.html> (visited Nov. 17, 2000). A 1997 Center for Responsive Politics survey found that two thirds of respondents believed the influence of contributions on elections and government policy was a major problem and that their own representatives would listen to the view of a large contributor before that of a constituent; 71 percent believed the high cost of campaigns was discouraging good people from seeking public office. <http://www.opensecrets.org/pubs/survey/s1.htm> (visited Nov. 17, 2000). A study of voters in Minnesota indicated that 88 percent of those surveyed believed that elected officials were more likely to respond to individuals and organizations that contributed to their campaigns than to those who did not. *See* Schultz, *supra*, 18 Rev. Litig. at 121.

Moreover, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

Public opinion surveys consistently show that Americans want meaningful campaign finance reform.[19] Congress comprises the elected representatives of the sovereign People. U.S. Const. art. I. These representatives should be afforded leeway to address the public's loss of faith in our system of governance. As Justice White admonished in his separate opinion in *Buckley*, the Court should not "claim[] more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed [the campaign finance bill] and the President who signed it." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part).

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[19] A March 2000 Mellman Group poll found that 85 percent of voters believe there is a need for campaign finance reform, with 59 percent of voters believing that "major" reforms are needed. <http://www.publiccampaign.org/articles/4-3report/report4_3_00.html (visited Nov. 17, 2000). Similarly, a 1997 survey found strong consensus for a wide range of finance reform proposals, including limiting "soft money" contributions to political parties (favored by 75 percent of respondents), limiting a candidate's ability to spend personal wealth on a campaign (70 percent), requiring congressional candidates to raise a certain percentage of their campaign funds in their own states (85 percent), and limiting or banning PAC contributions (61 percent). <http://www.opensecrets.org/pub/survey/s1.htm> (visited Nov. 17, 2000), Princeton survey. A 1996 Gallup poll found that 79 percent of respondents favored expenditure limits for congressional candidates. <http://www.publicampaign.org/pollsumm.html> (visited Nov. 17, 2000), *Public Campaign: The Power of Public Opinion*. A variety of polls conducted in 1996 and 1997 also reported that substantial majorities favored various proposals for public financing of federal campaigns. *See id.* (summarizing poll results).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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